No. 16-348

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MIDLAND FUNDING, LLC,

Petitioner,

v.

ALEIDA JOHNSON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR NARCA - THE NATIONAL CREDITORS BAR ASSOCIATION™ AND MARYLAND/DC CREDITORS BAR ASSOCIATION, INC., MISSOURI CREDITORS BAR, INC., KENTUCKY CREDITORS RIGHTS BAR ASSOCIATION, INC., OHIO CREDITOR'S ATTORNEYS ASSOCIATION, NEW YORK'S CREDITORS' BAR ASSOCIATION, FLORIDA CREDITORS BAR ASSOCIATION, PENNSYLVANIA CREDITORS' BAR ASSOCIATION, ILLINOIS CREDITORS BAR ASSOCIATION, ARIZONA CREDITOR BAR ASSOCIATION, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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OTHER AUTHORITIES

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Office of the United States Trustee, FY-2015 Trustee Audited Annual Reports, accessed at https://www.justice.gov/ust/private-trustee-data-statistics/chapter-13-trustee-data-and-statistics. 8

The Consumer Bankruptcy Fee Study: Final Report, 20 AM. BANKR. INST. L. REV. 17 (Spring 2012), Table A-2 9

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

NARCA – The National Creditors Bar Association™ is a nationwide, not-for-profit trade association of attorneys who represent creditors in debt collection matters. NARCA's members include over 500 law firms, all of whom must meet association standards designed to ensure experience and professionalism. Members are also guided by NARCA's code of ethics, which imposes an obligation of self-discipline beyond the requirements of pertinent laws and regulations.

Florida Creditors Bar Association, Illinois Creditors Bar Association, Maryland/DC Creditors Bar Association, Inc., Missouri Creditors Bar, Inc., Kentucky Creditors Rights Bar Association, Inc., New York's Creditors' Bar Association, Ohio Creditor's Attorneys Association, Pennsylvania Creditors' Bar Association, and Arizona Creditor Bar Association, Inc. are state-level, not-for-profit professional associations of attorneys and law firms engaged in the practice of debt collection law. The members of these organizations must meet their associations' standards, which are designed to ensure professionalism and ethics. All are also governed by the ethical obligations of their respective state bars and attorney disciplinary programs.

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1. As provided for in U.S. SUP. CT R 37(6) the *Amici* state that: (a) no party's counsel authored this brief in whole or in part; no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief; and (c) no person—other than the *Amici Curiae*, their members, and their counsel—contributed money to fund the preparation or submission of this brief. The parties have filed blanket consents.

NARCA members are regularly involved in the lawful collection of past-due consumer debts and must therefore interpret and apply the often-unsettled requirements of applicable collection law, principally the Fair Debt Collection Practices Act (FDCPA or Act), Pub. L. No. 95-109, 91 Stat. 874 (1977). NARCA has a strong interest in ensuring that the Act is interpreted in a way that allows collection attorneys to discharge their ethical duty to advance their clients' legitimate interests—within the bounds of existing law—without constantly exposing themselves to substantial personal liability. NARCA has participated as *amicus curiae* in other cases involving the interpretation or application of the Act. *See, e.g., Heintz v. Jenkins*, 514 U.S. 291 (1995); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 US 573 (2010); *Marx v. General Revenue Corp.*, 568 U.S. 2 (2013); *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926 (9th Cir. 2007).

NARCA and the state creditors' bar associations share common cause, as their members are regularly engaged by creditors to collect delinquent consumer debts. In collecting lawfully, their attorney members must interpret and comply with federal and state laws governing debt collection, including the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* (the "FDCPA" or the "Act"). As the only national bar group dedicated solely to the needs of consumer collection attorneys, NARCA has a significant interest in ensuring that the FDCPA is interpreted in a manner that allows collection attorneys to discharge their ethical duties of competence and diligence in advancing their clients' legitimate interests. Similarly, the state associations, as the respective leading state trade associations for consumer collection attorneys, have a significant interest in ensuring that the FDCPA is

interpreted in a manner that allows collection attorneys to discharge their ethical duty to zealously and lawfully advance their clients' legitimate interests.

The ruling underlying this appeal erroneously (and unfairly) exposes the attorney and law firm members of the *Amici*, and many clients of those members, to individual and class action claims under the FDCPA. The *Amici* have a direct interest in this litigation. Their organizations have authorized the filing of this brief

SUMMARY OF ARGUMENT

Lower courts have held that requesting payment of a time-barred debt dos not violate the FDCPA, but suing on such a debt does. The outcome reached by the Eleventh Circuit Court of Appeals requires equating bankruptcy proofs of claim with lawsuits. The *Amici* argue that proofs of claim are not complaints; however, if they are, they are protected by the Petition Clause of the First Amendment.

The *Amici* further argue that the Court should reject treatment of proof of claim as the equivalent of pleadings so as to satisfy the canon of constitutional avoidance. They further argue that such an approach is desirable because equating lawsuits (which must be filed by lawyers) with proofs of claim (which may be filed by lay persons) diminishes the role of attorneys and the profession of law.

Finally, the *Amici* argue that the Court should resolve the problems that lower courts have created by reading into the FDCPA provisions that are not present, and hold that the Act does not forbid suits on stale debts.

ARGUMENT

INTRODUCTION

The FDCPA is silent as to the collection of time-barred debts. The concept that collection of a time-barred debt might violate the FDCPA has its roots in *Kimber v. Federal Financial Corp.*, 668 F. Supp. 1480 (M.D. Ala. 1987). The *Kimber* court held that a debt collector violates the FDCPA when it sues, without a prior determination of timeliness, on a debt for which the statute of limitations has expired.

> Kimber claims that FFC's filing of the lawsuit against her violated § 1692f. That section states simply that, "A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt." Kimber argues that filing a lawsuit to collect on a debt that appears time-barred, without first determining after a reasonable inquiry that the limitations period is due to be tolled, constitutes an unfair and unconscionable practice offensive to § 1692f. The court agrees with Kimber.

Id. at 1487. Later courts expanded upon *Kimber*, concluding that the FDCPA does not prohibit a request for payment of a time-barred debt that is not accompanied by a suit or threat of suit. *See Freyermuth v. Credit Bureau Servs.*, 248 F.3d 767, 771 (8th Cir. 2001); *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 33 (3d Cir. 2011); *Shorty v. Capital One Bank*, 90 F. Supp. 2d 1330, 1332 (D.N.M. 2000); *Johnson v. Capital One*, No. SA-00-CA-315-EP, 2000 U.S. Dist. LEXIS 13311, 2000 WL 1279661, *1 (W.D. Tex. 2000).

Although the FDCPA permits a request for payment that is unaccompanied by a suit or threat of suit, the Eleventh Circuit Court of Appeals treats the filing of a bankruptcy claim as the equivalent of a suit or court complaint and not as a request for payment. As is addressed below, proofs of claim are not complaints, but even if they were, they are subject to First Amendment protections. Thus, this Court should reverse the decision of the court below and hold that the FDCPA does not prohibit the filing of a proof of claim on a time-barred debt.

I. PROOFS OF CLAIM ARE NOT COMPLAINTS

While filing a proof of claim and filing a lawsuit to collect a consumer debt both involve filing legal papers, this is where the similarity ends. When a creditor files suit against a consumer, it initiates the action with a complaint, one of the documents classified as a pleading under FED. R. CIV. P. 7(a). Service of the complaint and summons compels the debtor to respond, or face the loss of legal and economic rights. By contrast, when a debtor files for Chapter 13 bankruptcy, she is initiating an action against her creditors, in which she invites them, but does not obligate them, to file proofs of claim. The claims are paid out of the property of the estate, which is administered by an independent trustee. Proofs of claim require no response from the debtor, who is protected both by her own counsel and the independent trustee. No contested matter is initiated, nor is a contested issue adjudicated unless the debtor or a trustee objects to the claim. Thus, a proof of claim is a component of a system designed to afford relief *to* debtors, while a collection suit is intended to enforce rights *against* debtors. The Bankruptcy Rules define a proof of claim in a way that makes it clear that

it is neither a pleading nor a suit: "A proof of claim is a written statement setting forth a creditor's claim." FED. R. BANKR. P. 3001(a).

Most bankruptcy filings are initiated by a voluntary petition. 11 U.S.C. § 301. All Chapter 13 proceedings are the result of voluntary filings because the statute authorizing involuntary petitions, 11 U.S.C. § 303(a), does not authorize involuntary petitions under Chapter 13. *Toibb v. Ratliff*, 501 U.S. 157, 166 (1991). Thus, all Chapter 13 cases begin at the debtor's request.

Chapter 13 of the Bankruptcy Code allows a debtor to propose a plan for the repayment of a portion of her debts out of future income.

> Chapter 13 of the Bankruptcy Code provides bankruptcy protection to "individual[s] with regular income" whose debts fall within statutory limits. (citation omitted). Unlike debtors who file under Chapter 7 and must liquidate their nonexempt assets in order to pay creditors, (citation omitted), Chapter 13 debtors are permitted to keep their property, but they must agree to a court-approved plan under which they pay creditors out of their future income (citation omitted). A bankruptcy trustee oversees the filing and execution of a Chapter 13 debtor's plan. (citation omitted).

Hamilton v. Lanning, 560 U.S. 505, 508 (2010).

When a debtor files bankruptcy, an estate is created consisting of "all legal or equitable interests of the debtor

in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). In a Chapter 13 bankruptcy, the property of the estate also includes property acquired by the debtor after the filing of the petition and "earnings from services performed by the debtor after the commencement of the case." 11 U.S.C. § 1306. The creation of the estate is significant: payments under the plan come from the debtor's estate rather than directly from the debtor.

To be confirmable, the Chapter 13 plan must "provide for all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan." 11 U.S.C. § 1322(a)(1). The Court may confirm the debtor's plan if it meets several requirements, including that creditors will receive more than they would receive in a proceeding under Chapter 7 and that, if a creditor objects, the value of the property to be distributed is equal to the lesser of the amount of allowed claims or equals "all of the debtor's projected disposable income received in the applicable commitment period." 11 U.S.C. § 1325(a)(4), (b)(1); *see also Hamilton v. Lanning, supra.* A proof of claim is nothing more than a request to participate in the distribution from the bankruptcy estate. "[T]he 'animating purpose' in filing a proof of claim is to obtain payment by sharing in the distribution of the debtor's bankruptcy estate." *Dubois v. Atlas Acquisitions, LLC (In re Dubois)*, 834 F.3d 522 (4th Cir. 2016).

Once a claim is filed, it is the debtor or trustee who decides whether to initiate litigation over the claim. A proof of claim is deemed to be allowed unless a party in interest objects. 11 U.S.C. § 502(a). If an objection is filed, it creates a "contested matter" under FED. R. BANKR. P.

9014. *Pleasant v. TLC Liquidation Trust (In re Tender Loving Care Health Services, Inc.)*, 562 F.3d 158, 162 (2d Cir. 2009).

The Bankruptcy Code imposes upon the trustee the affirmative duty to "examine proofs of claim and object to the allowance of any claim that is improper" but only "if a purpose would be served." 11 U.S.C. § 704(a)(5); 11 U.S.C. § 1302(b)(1). In a case with a small distribution to unsecured creditors, the allowance of a particular claim is likely to have only a *de minimis* effect on other creditors. More importantly, from a consumer protection perspective, the composition of claims allowed, whether current or stale, will often have no effect on the debtor. In order to confirm a Chapter 13 plan, a debtor must pay the lesser of the amount of allowed claims or provide that "all of the debtor's projected disposable income" during the applicable commitment period is to be "applied to make payments to unsecured creditors under the plan." 11 U.S.C. § 1325(b)(1). Thus, unless a debtor has sufficient disposable income to pay claims in full, the amount of claims allowed impacts only the distribution of payments among creditors but imposes no burden or loss on the debtor. In most instances, the plan payments will be dictated by the debtor's disposable income and not at all by the amount of the unsecured claims.[2] The debtor pays what she can, it is divided among the unsecured creditors, and the debtor receives a discharge. The stale claim does no harm to the debtor.

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2. During Fiscal Year 2015, 66% of Chapter 13 cases closed paid unsecured creditors less than 40% on their claims, including 13,782 cases in which no amount was paid to unsecured creditors. Office of the United States Trustee, FY-2015 Trustee Audited Annual Reports, accessed at https://www.justice.gov/ust/private-trustee-data-statistics/chapter-13-trustee-data-and-statistics.

Finally, Chapter 13 debtors have more protections than individuals sued for debt collection. First, in the overwhelming majority of Chapter 13 bankruptcies debtors are represented by counsel. According to a study by the Consumer Bankruptcy Project, from 2003-2009, only 2.1%-3.0% of the debtors who filed for Chapter 13 relief did so on a *pro se* basis. Lois Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 AM. BANKR. INST. L. REV. 17, 69 (Spring 2012), Table A-2. Debtors also have the benefit of an independent Chapter 13 Trustee and active involvement by the court. As one bankruptcy judge (and former Chapter 13 trustee) explained:

> (T)he Court must stress that a Chapter 13 Trustee, who has the fiduciary duty to examine and object to any improper proofs of claim, was appointed in this case. Therefore, in a Chapter 13 bankruptcy, even a debtor or debtor's counsel who chooses not to prosecute claim objections is protected by additional oversight in the form of a trustee. The trustee and/or any party in interest, including the debtor and his creditors, may object to a claim. (citation omitted).
>
> In addition, the claim process, including claims disallowance in Chapter 13 cases, cannot be an abuse of process because the process itself is highly regulated and court controlled. One must only read the Bankruptcy Code and Rules to reach such a conclusion . . . The claims allowance and objection process is under almost constant court oversight. It would be highly difficult, perhaps impossible, to consistently abuse the claims process in a Chapter 13 bankruptcy

> given the scrutiny of the claims process by the debtor, the Chapter 13 Trustee and the bankruptcy court.

Robinson v. JH Portfolio Debt Equities, LLC, 554 B.R. 800, 816 (Bankr. W. D. La. 2016).

Thus, a proof of claim filing in a Chapter 13 case is vastly different in terms of both its nature and impact from the pleadings that initiate debt collection actions. Chapter 13 is a proceeding initiated by the debtor for her own benefit. Filing a claim does not initiate litigation and (in the case of an unsecured creditor such as Midland) usually has no tangible effect on the debtor. Throughout the proof of claim process, the debtor is protected not only by the court, but also by her own counsel and the trustee, both of whom have fiduciary obligations to review claims and protect the debtor's interests. By contrast, a debtor sued on a time-barred debt does not choose when to litigate, must respond in a limited period of time or face legal consequences, and may not have the benefit of counsel, let alone a trustee who is obligated to raise appropriate disputes to the claim.

II. TREATING PROOFS OF CLAIM AS COMPLAINTS BLURS THE DISTINCTION BETWEEN THE ROLE OF LAWYERS AND THE LAY PUBLIC

In ruling that the filing of a proof of claim on a time-barred debt violated the FDCPA, the Courts in *Johnson v. Midland Funding, LLC*, 823 F.3d 1334 (11th Cir. 2016) and *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014) relied on FDCPA cases that pertained to suits and threats of suit. However, by equating debt collection

litigation (which must be commenced by an attorney) to the filing of a proof of claim (which is an administrative act that may be performed by a lay person), the Eleventh Circuit decisions have diminished the practice of law.

The administrative nature of a proof of claim eliminates the requirement that a corporate entity act through counsel. Under 11 U.S.C. § 501, a "creditor" may file a proof of claim. A creditor is an entity that holds a claim against the debtor. 11 U.S.C. § 101(10)(A). The claim form may be executed by either the creditor or the creditor's authorized agent, neither of whom need be lawyers. FED. R. BANKR. P. 3001(b). Under FED. R. BANKR. P. 9010(a) a party may appear in a bankruptcy case and perform any act not constituting the practice of law through an agent. The Fifth Circuit Court of Appeals has held that filing claims and ancillary services are administrative functions which do not constitute the practice of law. *State Unauthorized Practice of Law Committee v. Paul Mason & Associates*, 46 F.3d 469, 472 (5th Cir. 1995).

The practice of law has long been held to high standards. Courts may prescribe standards for admission to the bar and prevent the unauthorized practice of law by the lay public. *Leis v. Flynt*, 439 U.S. 438 (1979). While a *pro se* individual may represent herself, a corporation must appear through counsel. *Rowland v. California Men's Colony*, 506 U.S. 194 (1993). It is well established that filing a lawsuit to collect a debt constitutes the practice of law. *Poirier v. Alco Collections*, 107 F.3d 347, 350-51 (5th Cir. 1997).

> [A] lawyer has been given certain privileges by the state. Because of these privileges, letters

> . . . purporting to be written by attorneys have a greater weight than those written by laymen. But such privileges are strictly personal, granted only to those who are found through personal examination to measure up to the required standards. Public policy therefore requires that whatever correspondence purports to come from a lawyer in his official capacity must be at least passed upon and approved by him. He cannot delegate this duty of approval to one who has not been given the right to exercise the functions of a lawyer.

American Bar Association, Formal Opinion 68 (1932).

Equating proofs of claim with complaints disregards the distinction between the privileges that attain only to lawyers and the activities that are available to the lay public. The *Amici* urge the Court not to start down the slippery slope of whittling away at this distinction by equating proofs of claim with lawsuit pleadings.

III. THE COURT SHOULD NOT TREAT PROOFS OF CLAIM AS PLEADINGS AS A MATTER OF CONSTITUTIONAL AVOIDANCE

A. If Proofs of Claim Are Pleadings Then They Are Subject to the *Noerr-Pennington* Doctrine

The *Amici* contend that proofs of claim simply are not pleadings. However, if the Court treats proofs of claim as pleadings, such treatment invokes the protections of the First Amendment to the United States Constitution.

There are few rights more important than those protected by the First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. CONST amend. I. In the words of Judge Cudahy of the Seventh Circuit Court of Appeals:

> This right has deep common law roots and is the foundation of our republican (although not necessarily Republican) form of government. *See McDonald v. Smith*, 472 U.S. 479 (1985); *United States v. Cruikshank*, 92 U.S. 542, 552, 23 L. Ed. 588 (1875); *see also Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1342 (7th Cir. 1977). Thus, parties may petition the government for official action favorable to their interests without fear of suit, even if the result of the petition, if granted, might harm the interests of others. *See United Mine Workers of America v. Pennington*, 381 U.S. 657, 670, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-44, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961).

Tarpley v. Keistler, 188 F.3d 788, 794 (7th Cir. 1999).

If the Court equates the filing of a proof of claim with the filing of a lawsuit, then such filing is conduct that should be protected under the Petition Clause and the interpretation of that clause in *Noerr* and *Pennington*, *supra*. If proofs of claim are treated as pleadings, then the decision of the Eleventh Circuit unnecessarily burdens conduct that is protected by the First Amendment.

That the issue underlying the alleged FDCPA violation is the statute of limitations further underscores the importance of the protections afforded by the Petition Clause. As a result of borrowing statutes, ambiguous limitations statutes, and a lack of clear case law, the statute of limitations applicable to a given debt is uncertain – a conundrum recognized by courts across the country. *See, e.g., Panico v. Portfolio Recovery Assocs., LLC*, No. 15-1566-BRM-DEA, 2016 U.S. Dist. LEXIS 124729 (D.N.J. Sept. 14, 2016); *Gray v. Suttell & Assocs.*, 123 F. Supp. 3d 1283 (E.D. Wash. 2015); *Taylor v. First Resolution Inv. Corp.*, 2016-Ohio-3444, 2016 Ohio LEXIS 1654 (Ohio June 16, 2016); *Hill v. Am. Express*, 289 Ga. App. 576, 657 S.E.2d 547 (Ga. Ct. App. 2008); *Portfolio Recovery Assocs., LLC v. King*, 14 N.Y.3d 410, 927 N.E.2d 1059 (N.Y. 2010); *Unifund CCR Partners v. Sunde*, 163 Wn. App. 473, 260 P.3d 915, 922-23 (Wash. App. Div. 2 2011); *McCorriston v. L.W.T., Inc.*, 536 F. Supp. 2d 1268 (M.D.Fla. 2008); *CACV of Colo., LLC v. Stevens*, 274 P.3d 859, 248 Ore. App. 624 (Or. Ct. App. 2012).[3] As is clear from

3. There are also a variety of tolling factors that make the bar date on a debt unclear. Temporary absence from a state, incarceration, mental disability, military service, and bankruptcy are all factors that could toll limitations, but the claimant in a suit or bankruptcy case has only the power to advocate for tolling, not to make a binding decision.

these cases, even experienced attorneys (on both sides of the docket) cannot always determine the correct statute of limitations. Attorneys must be able to advocate for the statute that best protects their clients, and such advocacy is protected by the First Amendment.

The *Amici* anticipate Respondent will argue that recognition of such Constitutional protection will undermine the protections afforded by the FDCPA, but any such argument wholly misses the point. As this Court knows, an act of Congress does not take precedence over the Constitution. *Marbury v. Madison*, 5 U.S. 137, 177-178 (1803). *See also, Citizens United v. FEC*, 558 U.S. 310 (2010) (recognizing that a statute cannot override the protections of the First Amendment). The Constitution is supreme, and "that which is not supreme must yield to that which is supreme." *Brown v. Maryland*, 12 Wheat. 419, 448 (1827). "]I]f the enforcement of any act of congress sacrifices the constitutional rights of the citizen, the act must yield to the higher law of the constitution." *Brown v. Walker*, 70 F. 46, 48 (C.C.D. Pa. 1895).

If the filing of a proof of claim is treated merely as a request for payment, then no petitioning conduct is at issue and no FDCPA violation has occurred, as the FDCPA does not prohibit a request for payment of a time-barred debt that is not accompanied by a suit or threat of suit. *See Freyermuth v. Credit Bureau Servs.*, 248 F.3d 767, 771 (8th Cir. 2001); *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 33 (3d Cir. 2011); *Shorty v. Capital One Bank*, 90 F. Supp. 2d 1330, 1332 (D.N.M. 2000); *Johnson v. Capital One*, No. SA-00-CA-315-EP, 2000 U.S. Dist. LEXIS 13311, 2000 WL 1279661, *1 (W.D. Tex. May 17, 2000). But if proofs of claim are equated with pleadings, the result is

not merely a chill on petitioning speech, but a hard freeze. Courts have repeatedly held that the FDCPA is a strict liability statute, imposing liability even for unintentional violations. *Russell v. Equifax ARS*, 74 F3d 30, 33 (2d Cir. 1996); *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232, 1238-39 (5th Cir. 1997); *Gearing v. Check Brokerage Corp.*, 233 F.3d 469, 472 (7th Cir. 2000); *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1175 (9th Cir. 2006); *Reichert v. Nat'l Credit Sys., Inc.*, 531 F.3d 1002, 1005 (9th Cir. 2008). Furthermore, FDCPA defendants have been denied the defense of litigation immunity in FDCPA cases. *Sayyed v. Wolpoff & Abramson, LLP*, 485 F.3d 226, 229-30 (4th Cir. 2007). The First Amendment is the last refuge for debt collection attorneys and their clients who wish to advocate in good faith for a claim that could be, but is not necessarily time-barred. The *Amici* urge the Court to preserve this refuge by holding that the filing of a bankruptcy claim is neither a suit nor the equivalent of a suit, – but that if the Court equates the two processes, that it hold such conduct is protected by the First Amendment.

B. The Court Should Avoid Implicating Constitutional Concerns

As noted above, both FDCPA liability and the Petition Clause issues are implicated solely because the Eleventh Circuit has equated proofs of claim with the filing of a suit, since finding them not to be pleadings would result in a finding of no FDCPA liability under *Freyermuth* and *Huertas, supra.* Rejection of the Eleventh Circuit's analysis would enable this Court to avoid the Petition Clause issues raised above.

This Court has stated that "'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'" *Jones v. United States*, 526 U.S. 227, 239 (1999) (*quoting United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)). This principle "has for so long been applied by this Court that it is beyond debate," *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The canon of constitutional avoidance is intended to show respect for Congress by presuming it "legislates in the light of constitutional limitations," *Rust v. Sullivan*, 500 U.S. 173, 191 (1991).

The *Amici* suggest that the simplest way to avoid implicating constitutional issues is to adopt the holdings in *Freyermuth* and *Huertas*, and hold that the filing of a proof of claim on a time-barred debt is neither a suit nor a threat of suit; therefore, such conduct does not violate the FDCPA. Such a holding is consistent with the facts, the existing case law, and the canon.

C. Application of the FDCPA to Proofs of Claim Is Unnecessary, as FED. R. BANKR. P. 3001 and 9011 Already Provide Adequate Remedies

As further reason for avoiding the clash between the FDCPA and the First Amendment that is created by the decision of the court below, the *Amici* assert that Congress and this Court have already provided adequate remedies for the conduct of which Johnson complains. The Bankruptcy Code provides a comprehensive scheme for the resolution of claims against a debtor's

estate. The Constitution grants Congress the power to establish uniform laws in just two areas: bankruptcy and naturalization. U.S. CONST. art. I, § 8, cl. 4. This Court has recognized the exclusive nature of the system for filing and resolving claims. In *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 448 (2004), the Court stated:

> Bankruptcy courts have exclusive jurisdiction over a debtor's property, wherever located, and over the estate. (citation omitted). In a typical voluntary bankruptcy proceeding under Chapter 7, the debtor files a petition for bankruptcy in which she lists her debts or her creditors, (citation omitted); the petition constitutes an order for relief (citation omitted). The court clerk notifies the debtor's creditors of the order for relief, (citation omitted), and if a creditor wishes to participate in the debtor's assets, he files a proof of claim (citation omitted). . . .
>
> A bankruptcy court is able to provide the debtor a fresh start in this manner, despite the lack of participation of all of his creditors, because the court's jurisdiction is premised on the debtor and his estate, and not on the creditors. (citation omitted). A bankruptcy court's in rem jurisdiction permits it to "determin[e] all claims that anyone, whether named in the action or not, has to the property or thing in question. The proceeding is 'one against the world.'" (citations omitted).

Congress has legislated the process for filing and adjudicating claims through 11 U.S.C. § 501(a), which allows the filing of a proof of claim, and 11 U.S.C. § 502, which provides that claims are allowed unless objected to and sets forth the grounds for such objections. These statutory grants are implemented by rules governing the procedure for filing a claim, FED. R. BANKR. P. 3001; the consequences for failure to comply with those rules, FED. R. BANKR. P. 3001(c)(2)(D); filing a frivolous claim, FED. R. BANKR. P. 9011; and filing a false claim, 18 U.S.C. § 152(4).

FED. R. BANKR. P. 3001(c)(2)(D) provides specific consequences for filing a noncompliant proof of claim. Those consequences include rejection of the claim or an award of reasonable expenses and attorney's fees. FED. R. BANKR. P.9011 allows the imposition of sanctions not only for frivolous petitions, pleadings, and written motions, but also for "other paper[s]." Thus, this Court has already specified the remedy for the conduct of which Johnson complains.

The Bankruptcy Code, implemented by the Rules of Bankruptcy Procedure, is intended to be a comprehensive body of law addressing the conduct of bankruptcy proceedings. Attempting to apply an FDCPA overlay that invokes serious constitutional questions should be avoided for the reasons set forth above. Such an overlay is unnecessary in light of the protections afforded under Rules 3001 and 9011.

IV. THE COURT SHOULD RESOLVE THE PROBLEMS CREATED BY THE VARIOUS LOWER COURTS AND HOLD THAT SUIT ON A TIME-BARRED DEBT IS NOT A VIOLATION OF THE FDCPA

It has become commonplace for litigants in collection suits (and subsequent FDCPA proceedings) to disagree about the statute of limitations applicable to a debt. However, collection attorneys (like any other litigators) have both the privilege and the duty to petition courts on behalf of their clients, and if a reasonable argument can be made that a suit is not time-barred, the lawyer's ethical duties should compel him or her to prosecute the client's claims. The presence of a good-faith argument under the law is sufficient to shield the attorney from liability under rules such as FED. R. CIV. P. 11, its state law counterparts, and FED. R. BANKR. P. 9011. On the other hand, those rules, and the well-established "sham" exception to the *Noerr-Pennington* Doctrine protect debtors from unscrupulous attorneys who file suits that they know are time-barred, hoping that the debtor will default.

The constitutional infirmity that is of concern to the *Amici* arises solely because courts have added to the FDCPA provisions not included by Congress. Although the drafters of the FDCPA crafted detailed lists of violative conduct, including specific provisions regarding venue in suits brought by debt collectors, they did not include suits on time-barred debts. The alleged prohibition on such suits is a creation of the lower courts that amounts to legislation by judicial decree. Such expansion of the FDCPA was improper.

Attorneys play a crucial role in advancing their clients' requests to courts. *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 545 (2001) (law restricting arguments available to attorneys "prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power"), cited in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 623 (2010) (Kennedy, J., dissenting). That petitioning conduct includes requests to courts and communications incidental to a court action. If a lawyer incurs liability under the FDCPA because the suit that (s)he thought was timely is ultimately determined to be time-barred, then creditors' attorneys cannot carry out their ethical duties of competence, diligence, and advocacy when clients need them to advance, clarify, or, extend the law of limitations or make a good-faith argument to reverse existing law. The FDCPA's *bona fide* error defense imposes too many burdens[4] to be an adequate response to the restrictions on advocacy and petitioning created by the line of FDCPA cases dealing with suits on time-barred debts.

This Court has warned that the FDCPA should not be assumed to compel absurd results when applied to debt collection attorneys. *Jerman*, 559 U.S. at 600, 130 S.Ct. 1605, 1622, 176 L.Ed.2d 519, 539. Those lower courts which have held that a suit on a time barred debt violates the FDCPA have disregarded that warning. The consequence is an additional problem that this Court has warned against – lawyers face liability under a strict

4. A review of the PACER docket in *Gray v. Suttell*, *supra*, provides insight into the amount of work that can be necessary to present a *bona fide* error defense. The cost of such defense so thoroughly dwarfs the exposure in an individual FDCPA case (and many a class case) so as to render the defense meaningless.

liability statute for an unsuccessful suit, even when the suit advances limitations arguments that were not previously resolved. *See Heintz v. Jenkins*, 514 U.S. 291, 296, 115 S. Ct. 1489, 1491, 131 L. Ed. 2d 395 (1995); *Jerman*, 130 S.Ct. at 1622. Respectfully, making attorneys the strictly liable insurers of their clients' success falls within the realm of 'absurd" results. Therefore, on behalf of their respective members the *Amici* urge the Court to reject completely the doctrine that the FDCPA forbids suits on time-barred debts.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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